UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COMAU, INC.

and Cases 7–CA–52614
7–CA–52939

AUTOMATED SYSTEMS WORKERS LOCAL 1123,
affiliated with CARPENTERS INDUSTRIAL COUNCIL,
UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA

and

COMAU EMPLOYEES ASSOCIATION (CEA) – Party in Interest

COMAU EMPLOYEES ASSOCIATION (CEA)

and Case 7–CB–16912

AUTOMATED SYSTEMS WORKERS LOCAL 1123,
affiliated with CARPENTERS INDUSTRIAL COUNCIL,
UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA

Sarah Pring Karpinen, Esq.
for the Acting General Counsel.
M. Catherine Farrell and *David J. Franks, Esqs.*,
of Bloomfield Hills, Michigan, for the Respondent Union (CEA).

ORDER GRANTING THE ACTING GENERAL COUNSEL'S MOTION TO DISMISS THE CEA'S APPLICATION FOR ATTORNEYS' FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. On July 25, 2012, the Comau Employees Association (CEA) filed an application for attorneys' fees in this case under the Equal Access to Justice Act (EAJA). On August 28, 2012, the Acting General Counsel filed a

motion to dismiss the CEA's application. On September 18, 2012, the CEA filed its response to the Acting General Counsel's motion to dismiss.[1]

On the entire record, including the briefs filed by the CEA and the Acting General Counsel, I hereby grant the Acting General Counsel's motion to dismiss the CEA's application for attorneys' fees for the reasons set forth below.

PROCEDURAL AND FACTUAL HISTORY

A. *ALJ Decision in Comau, Inc., Case No. 7–CA–52106* (*Comau I)*

On August 28, 2009, the Regional Director for Region 7 of the National Labor Relations Board issued a complaint alleging, among other things, that Comau violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally changing the healthcare benefits for bargaining unit employees without first giving notice to and bargaining with the union. Specifically, the complaint alleged that although there was a good faith impasse when Comau unilaterally imposed its last, best and final offer on December 22, 2008, the impasse had been broken when Comau's new healthcare plan (included in the last, best and final offer) took effect on March 1, 2009. In its defense, Comau maintained that it lawfully implemented its healthcare plan when the parties were at a good faith impasse on December 22, 2008.

On May 20, 2010, the administrative law judge (ALJ) in *Comau I* ruled that Comau violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its healthcare plan on March 1, 2009, because any impasse regarding the employee healthcare plan had been broken by that date.

B. *Litigation in Comau Inc., Cases 7–CA–52614, 7–CA–52939 and 7–CB–16912 (Comau II)*

On June 30, 2010, the Acting General Counsel issued a consolidated complaint alleging, among other things, that Comau violated Section 8(a)(2), (3), (5) and (1) of the Act when it (on December 22, 2009) withdrew recognition from the ASW, recognized the CEA as the exclusive collective-bargaining representative of the bargaining unit, and entered into a collective-bargaining agreement with the CEA that included a union-security clause. The complaint also alleged that the CEA violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition from Comau as the bargaining unit's exclusive collective-bargaining representative, and entering into a collective-bargaining agreement with Comau that contained a union-security clause (also on December 22, 2009).

The Acting General Counsel offered two theories in support of these new allegations when this matter went to trial (on August 31 – September 3, 2010, and September 16–17, 2010). First, the Acting General Counsel maintained that the December 2009 disaffection petition that Comau relied on to conclude that the ASW did not represent a majority of employees in the unit

[1] Neither the Respondent Comau nor the Charging Party Automated Systems Local 1123 (ASW) participated in litigating the Comau Employees Association's application for attorneys' fees under the Equal Access to Justice Act that is addressed herein.

was tainted by Comau's prior unfair labor practices (specifically, the employee healthcare plan that Comau unilaterally imposed). Second (and in the alternative), the Acting General Counsel asserted that the disaffection petition was tainted because certain individuals (Harry Yale, James Reno, and Nelson Burbo) who circulated it did so with the apparent authority of Comau. Comau and the CEA contested both theories, asserting that employee discontent with the ASW was not tainted by or attributable to any prior unfair labor practice (including the healthcare plan, which they maintained was lawfully imposed) or any involvement by Comau agents.

C. *The Board's Decision in Comau I*

While *Comau II* was still pending before me, on November 5, 2010, the Board affirmed the ALJ's rulings, findings, conclusions and remedy in *Comau I*, except for minor modifications that were not relevant to my analysis in *Comau II*. *See Comau, Inc.*, 356 NLRB No. 21 (2010). The findings set forth in *Comau I*, including the finding that Comau violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its healthcare plan on March 1, 2009, therefore became binding authority for purposes of my analysis in *Comau II*.

D. *My ALJ Decision in Comau II*

On December 21, 2010, I issued my decision in *Comau II*. After considering the entire record, I found that Comau's unilateral implementation of its employee healthcare plan on March 1, 2009 (deemed an unfair labor practice in *Comau I*), had a causal relationship to the loss of support for the ASW. I also found that the disaffection petition that employees circulated and signed in December 2009 to express their disaffection with the ASW was tainted by the unfair labor practice that the ALJ and the Board found in *Comau I*.[2] Accordingly, I ruled that Comau violated Section 8(a)(1), (2), (3) and (5) of the Act by withdrawing recognition from the ASW, recognizing the CEA as the exclusive collective bargaining representative of the bargaining unit, and by entering into a collective-bargaining agreement with the CEA that contained a union-security clause. I also held that the CEA violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition from Comau when the CEA did not represent an uncoerced majority of employees in the bargaining unit, and by entering into a collective bargaining agreement with Comau that contained a union-security clause. Finally, I held that both Comau and the CEA unlawfully coerced employees to sign dues-checkoff authorization forms for the CEA (in violation of Section 8(a)(1) and 8(b)(1)(A) of the Act, respectively).

E. *District Court Decision in 10(j) Proceeding Based on Comau II*

At the same time that *Comau II* was pending before me, the Acting General Counsel filed a petition for interim injunctive relief under Section 10(j) of the Act. The district court judge denied the Acting General Counsel's request for an injunction under Section 10(j) on February 10, 2011, stating that a temporary injunction was not supported by reasonable cause and/or

[2] I did not rule on the Acting General Counsel's alternate theory that the December 2009 employee disaffection petition was tainted because it was circulated by individuals who were agents of Comau.

would not be just and proper.[3] *Glasser v. Comau, Inc.*, 767 F. Supp. 2d 778, 793 (E.D. Mich. 2011). In support of his ruling, the district court judge questioned whether the Acting General Counsel established a causal connection between Comau's March 1, 2009 implementation of its new employee healthcare plan and Comau employee dissatisfaction with the ASW (some of which pre-dated March 1).[4] Id. at 790–792. The district court judge also found that injunctive relief would not be just and proper because such relief was not necessary to prevent further irreparable harm to the ASW, since *Comau II* was pending before the Board and employee support for the ASW began eroding before Comau implemented its new employee healthcare plan. Id. at 792–793.

F. *The Board's January 3, 2012 Decision in Comau II*

On January 3, 2012, the Board issued a 2–to–1 decision affirming my decision in *Comau II*. In particular, the Board agreed that the Acting General Counsel established a causal relationship between Comau's unilateral change to its employee healthcare plan (a change deemed unlawful in *Comau I*) and the ASW's subsequent loss of majority support. The Board therefore concluded that Comau's unilateral change to the employee healthcare plan tainted the December 2009 employee disaffection petition.[5] *Comau, Inc.*, 357 NLRB No. 185, slip op. at 4 (2012).

The Board's decision, however, was short-lived, because the Board inadvertently failed to consider the exceptions and briefs that the CEA filed when my decision was appealed to the Board. Accordingly, in response to a motion to reconsider filed by the CEA, on February 8, 2012, the Board vacated and rescinded its January 3, 2012 decision and agreed to reconsider the case *de novo*.

G. *The D.C. Circuit's March 2, 2012 Decision to Deny Enforcement in Comau I*

The U.S. Court of Appeals for the District of Columbia Circuit denied the Board's application to enforce the Board's decision in *Comau I* on March 2, 2012, finding that the Board's ruling that Comau committed an unfair labor practice when it unilaterally changed employee healthcare benefits was arbitrary and capricious. *Comau, Inc. v. NLRB*, 671 F.3d 1232, 1239 (2012); see also id. at 1236 (explaining that the court of appeals will only vacate a Board decision if the factual findings are not supported by substantial evidence, or if the Board departs from established precedent without a reasoned explanation, and thus renders a decision

[3] As the district court judge noted, the district court is not charged with the responsibility of reviewing the ALJ's or the Board's decisions about whether unfair labor practices were committed, because that responsibility lies with the United States Courts of Appeals. ALJ and Board decisions are relevant, however, to the district court's analysis of whether injunctive relief is appropriate under Section 10(j) of the Act.

[4] The district court also found that the evidentiary record did not support the Acting General Counsel's theory that the December 2009 disaffection petition was tainted because it was circulated by employees who were acting with the apparent authority of Comau. *Glasser v. Comau, Inc.*, 767 F. Supp. 2d at 789.

[5] The Board declined to address the Acting General Counsel's alternate theory that the disaffection petition was tainted by the involvement of non-supervisory leaders acting with the apparent authority of Comau. *Comau, Inc.*, 357 NLRB No. 185, slip op. at 4 fn.11 (2012).

that will be vacated as arbitrary and capricious). The D.C. Circuit rejected the Board's position that Comau did not implement the new healthcare plan until the plan's March 1, 2009 effective date (and thus after the impasse regarding employee healthcare was broken), explaining that established Board precedent recognizes that an employer can "implement" a change to the terms and conditions of employment before the change is "effective" and is actually applied to employees. The D.C. Circuit therefore concluded that Comau did not violate the Act when it unilaterally implemented its new employee healthcare plan on December 22, 2008, because it was undisputed that the parties were at a lawful impasse on that date. Id. at 1239–1240.

H. *The Board's June 27, 2012 Decision in Comau II*

On June 27, 2012, the Board issued a new decision that reversed in part and affirmed in part my decision in *Comau II*. *Comau, Inc.*, 358 NLRB No. 73 (2012). Citing the D.C. Circuit's ruling that Comau lawfully implemented the unilateral change to its employee healthcare plan, the Board held that the December 2009 disaffection petition was not tainted by the lawful unilateral change at issue in *Comau I*. Id., slip op. at 2. Next, the Board turned to the Acting General Counsel's alternative theory that the disaffection petition was tainted because it was circulated by nonsupervisory lead employees who were acting with the apparent authority of Comau. On that issue, the Board determined that the Acting General Counsel did not meet its burden of proving that the employees who circulated the disaffection petition were reflecting company policy or acting as agents for Comau. Id. at 3. Having rejected both of the Acting General Counsel's theories that the disaffection petition was tainted, the Board concluded that Comau was entitled to rely on the petition when it withdrew recognition from the ASW and recognized the CEA as the employees' majority choice for collective-bargaining representative. The Board therefore dismissed the complaint allegations that Comau violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the ASW, and that Comau and the CEA, respectively, violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) by extending and accepting recognition, and by entering into a collective-bargaining agreement containing a union-security clause. *Comau, Inc.*, 358 NLRB No. 73, slip op. at 4.

Last, the Board affirmed my ruling that Comau violated Section 8(a)(1) of the Act by threatening two employees with discipline or discharge if they did not execute dues-checkoff authorization forms for the CEA, and my ruling that Comau and the CEA violated Section 8(a)(1) and Section 8(b)(1)(A), respectively, by making statements and engaging in other conduct that had a reasonable tendency to coerce a third employee to execute a dues-checkoff authorization form. Id. at 4–5.

I. *The CEA's Application for Attorneys' Fees under the EAJA*

With the mostly favorable decision from the Board in *Comau II* in hand, on July 25, 2012, the CEA filed an application for attorneys' fees under the EAJA. Specifically, the CEA asserted that since it was the prevailing party in *Comau II*, it was entitled to $72,725 in attorneys' fees that it incurred to prepare and present its defense in *Comau II*, and an additional amount in attorneys' fees ($7,750 at the time of its fee application) that it incurred in preparing and

litigating its application for attorneys fees under the EAJA.[6]

The CEA's application for attorneys' fees and an affidavit attached thereto assert that when the Acting General Counsel initiated litigation in *Comau II*, the CEA's net worth did not exceed $7 million, and the CEA employed less than 500 employees (two of the eligibility criteria for attorneys' fees under the EAJA). See Board Rule Section 102.143(c)(2). The CEA also asserts that the Acting General Counsel was not substantially justified in maintaining (in *Comau II*) that the December 2009 disaffection petition was tainted, because the Acting General Counsel's positions regarding that allegation did not have a reasonable basis in law or in fact. In a motion to dismiss the CEA's fee application, the Acting General Counsel asserts that the CEA's application fails because the CEA did not provide sufficient financial information to show that it meets the threshold eligibility criteria for attorneys' fees under the EAJA, and because the Acting General Counsel's position was substantially justified at all stages of litigation in *Comau II*.

APPLICABLE LEGAL STANDARD

Under EAJA and the Board's implementing regulations, the Board shall award to an eligible respondent who prevailed in an adversarial proceeding the fees and other expenses incurred by the respondent unless the General Counsel demonstrates that his position was "substantially justified" or that special circumstances make an award unjust. *Raley's*, 357 NLRB No. 81, slip op. at 1 (2011) (citing 5 U.S.C. § 504(a)(1) and Section 102.144(a) of the Board's Rules and Regulations). In this case, the applicable threshold eligibility criteria require the CEA to show that it has a net worth of not more than $7 million, and that it does not have more than 500 employees. Board Rule Section 102.143(c)(2).

To determine whether litigation was substantially justified, the EAJA favors treating a case as an inclusive whole rather than as atomized line-items. *Raley's*, 357 NLRB No. 81, slip op. at 1 (citing *Commissioner, INS v. Jean*, 496 U.S. 154, 161–162 (1990); *C. Factotum*, 337 NLRB 1, 1 (2001)). Further, the Board must determine whether the allegations were substantially justified at each phase of the litigation. *Glesby Wholesale*, 340 NLRB 1059, 1060 (2003). In *Pierce v. Underwood*, 487 U.S. 552, 563–566 (1988), the Supreme Court explained that an agency's position is substantially justified where the evidence is "what a reasonable mind might accept as adequate to support a conclusion"—i.e., where it has a reasonable basis in fact and law. An agency's position is substantially justified when "reasonable people could differ" on whether the action should go forward. Id.; see also *Teamsters Local 741*, 321 NLRB 886, 889 (1996). The mere fact that the General Counsel lost or advanced a position contrary to prior precedent does not mean the litigation lacked substantial justification. *Raley's*, 357 NLRB No. 81, slip op. at 1 (citing *Alpha-Omega Electric*, 312 NLRB 292, 293 (1993)). The applicable standard is not intended to deter the General Counsel from bringing forward close questions of fact or new theories of law. *Meaden Screw Products, Co.*, 336 NLRB 298, 300 (2001). Finally,

[6] The CEA's fee requests are based on an hourly rate of $250 per hour. Board Rules, however, only permit a maximum attorney fee rate of $75 per hour for purposes of EAJA attorneys' fee applications. See Board Rule Section 102.145(b). There is no indication that the CEA has filed (or that the Board has granted) a petition for rulemaking to change maximum attorney fee rate specified in the Board Rules.

the clarity of the governing legal principles, or lack thereof, must be taken into account. *Abell Engineering & Mfg.*, 340 NLRB 133, 133–134 (2003).

DISCUSSION AND ANALYSIS

A. *The Evidence that the CEA Provided Regarding its Net Worth is Arguably Deficient, but that Deficiency is not Dispositive at this Stage of the EAJA Proceedings*

Under the Board Rules that apply to EAJA applications for attorneys' fees, an application for attorneys' fees "shall include a statement that the applicant's net worth does not exceed . . . $7 million." Board Rule Section 102.147(b). In addition, the EAJA application must include "a detailed exhibit showing the net worth of the applicant and any affiliates . . . when the adversary adjudication was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant" meets the threshold eligibility criteria for attorneys' fees under the EAJA. Board Rule Section 102.147(f); see also *Pacific Coast District Council*, 295 NLRB 156, 157 (1989) (EAJA applicant bears the burden of proving that it meets the EAJA net worth criteria).

In this case, the CEA provided an affidavit signed by CEA President Harry Yale that meets the requirements of Board Rule Section 102.147(b) insofar as Mr. Yale stated that the CEA had fewer than 500 employees and a net worth below $7 million when litigation in *Comau II* was initiated. The Acting General Counsel correctly observes, however, that the CEA's application for attorneys' fees is deficient because the CEA did not provide a detailed exhibit regarding its net worth, as required by Board Rule Section 102.147(f). Compare *Arizona Mechanical Insulation, LLC*, 345 NLRB 1257, 1258 (2005) (EAJA applicant provided both an affidavit and a balance sheet regarding net worth to show that it met the EAJA threshold eligibility criteria).

I agree with the Acting General Counsel that the CEA should have filed a detailed exhibit regarding its net worth, because that exhibit is required by Board Rule Section 102.147(f) and is essential for the Acting General Counsel and me to evaluate whether the CEA meets the threshold eligibility criteria for attorneys' fees under the EAJA. I do not agree, however, that the CEA's failure to provide a detailed exhibit about its net worth warrants dismissing the CEA's application for attorneys' fees at this stage, because the Board Rules indicate that I should first afford the CEA the opportunity to file additional financial information to establish that its meets the EAJA's threshold eligibility criteria (i.e., the CEA should have the opportunity to cure the deficiency in its proof of net worth). See Board Rule Section 102.147(f) ("The administrative law judge may require an applicant to file such additional financial information as may be required to determine its eligibility for an award.").

In any event, ultimately the point is moot. As the analysis in the following sections will demonstrate, even if I were to assume that the CEA meets the EAJA's threshold eligibility criteria for attorneys' fees, a fee award is not warranted in this case because the Acting General Counsel's position was substantially justified throughout all phases of litigation in *Comau II*. I now turn to that issue.

B. *The Acting General Counsel's Position that the Disaffection Petition was Tainted by Comau's Unilateral Change to its Employee Healthcare Plan was Substantially Justified.*

As previously noted, in *Comau II*, the Acting General Counsel's principal challenge to Comau's decision to withdraw recognition from the ASW in December 2009 was that Comau improperly relied on a December 2009 employee disaffection petition that was tainted by a prior unfair labor practice: Comau's unilateral implementation of a new employee healthcare plan that took effect on March 1, 2009. The CEA maintains that the Acting General Counsel's position about the employee healthcare plan was not substantially justified.

1. The Acting General Counsel's theory that the unilateral change tainted the disaffection petition had a reasonable basis in law

It is well established that an employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship. *Champion Home Builders*, 350 NLRB 788, 791 (2007). Not every unfair labor practice, however, will taint evidence of a union's subsequent loss of majority support. In cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support, as indicated by the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Champion Home Builders*, 350 NLRB at 791 (*citing Master Slack Corp.*, 271 NLRB 78, 84 (1984)).

When the Acting General Counsel began litigation in this case (*Comau II*), it had already obtained a ruling from the ALJ in *Comau I* that Comau violated the Act when it unilaterally implemented its new employee healthcare plan.[7] Thus, the Acting General Counsel merely had to demonstrate that the unfair labor practice established in *Comau I* indeed tainted the December 2009 disaffection petition that Comau relied upon when it withdrew recognition from the ASW. Since the Board had already recognized that unilateral changes to terms and conditions of employment (including changes to employee healthcare plans) harm the union's status as the bargaining representative because the employer's actions undermine the union in the eyes of the employees and give the impression that the union is powerless, the Acting General Counsel reasonably believed that it held a strong hand in litigating *Comau II*. See *Priority One Services*, 331 NLRB 1527, 1527 (2000) (recognizing that unilateral increases in employee health insurance premiums can undercut the union's ability to function as the employees' bargaining representative, because the unilateral changes substantially affect all unit employees and directly impact employee compensation, one of the fundamental subjects of bargaining).

To get around the hurdles posed by the procedural history of *Comau II*, the CEA argues that the legal analysis in *Comau I* was so patently flawed that the Acting General Counsel should

[7] As previously noted, the Board affirmed the ALJ's ruling in *Comau I*. The Board's decision remained valid until March 2, 2012, when it was reversed by the D.C. Circuit.

have known that the D.C. Circuit ultimately would uphold (on March 2, 2012) Comau's decision to unilaterally implement its new employee healthcare plan.[8] In support of its argument, the CEA emphasizes that in *Comau I*, the D.C. Circuit found that Board case law did not support the ALJ's ruling in *Comau I* that a change to the terms of employment cannot reasonably be viewed as "implemented" at a time when the change is not being applied to any employees and the employer has not passed a "point of no return" committing it to make the change. *Comau, Inc.*, 671 F.3d at 1239–1240 (noting that during oral argument, Board counsel conceded that no specific case supported the "point of no return" formulation).

The D.C. Circuit's ruling in *Comau I* does not establish that the Acting General Counsel should not have relied on the ALJ's or the Board's decisions when litigating *Comau II*. The question in *Comau I* about whether Comau acted lawfully when it unilaterally changed its employee healthcare plan was a complex one, particularly given the underlying facts, which show that although Comau lawfully imposed its last best offer on December 22, 2008 (when the parties were at impasse), the parties quickly broke the impasse and returned to the bargaining table to specifically discuss employee health insurance on multiple occasions between January 7, 2009 and March 1, 2009 (the effective date for Comau's employee healthcare plan). In light of those facts, the reasonable questions that those facts raise about when the healthcare plan was implemented, and the lack of Board case law that addressed the specific and unique circumstances at issue in *Comau I*,[9] the Acting General Counsel was substantially justified in litigating the close legal questions at issue in *Comau I* and in relying on the favorable decisions that it obtained in *Comau I* as a predicate for litigating *Comau II*. See *Raley's*, 357 NLRB No. 81, slip op. at 1 (explaining that the mere fact that the General Counsel lost or advanced a position contrary to prior precedent does not mean the litigation lacked substantial justification, and that the standard for attorneys' fees under the EAJA is not intended to deter the General

[8] I am not persuaded by the CEA's assertion that the Acting General Counsel's position in *Comau II* was not substantially justified because the D.C. Circuit ruled that the Board's finding in *Comau I* was "arbitrary and capricious." *Comau, Inc. v. NLRB*, 671 F.3d at 1239. The term "arbitrary and capricious" is a term of art that applies when a court of appeals rejects an agency's legal analysis, regardless of where the agency's analysis falls on the spectrum between reasonable but legally flawed (e.g., because the agency's ruling departs from established precedent without a reasoned explanation, see *Comau I*, 671 F.3d at 1236) and patently outrageous. See *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. 1986) (noting that the "arbitrary and capricious" label applies to a rich variety of agency conduct, including sensible but legally flawed actions as well as outrageous ones). Because of that fact, a finding on the merits that an agency's action was arbitrary and capricious (such as in *Comau I*) does not compel an award of attorneys' fees under the EAJA (see *Rose*, 806 F.2d at 1087), nor does it compel a finding that the underlying decisions (in *Comau I*) were so patently flawed that the Acting General Counsel should not have relied upon them while litigating *Comau II*.

[9] To be sure, the D.C. Circuit did evaluate Board precedent and find that an employer can implement a change in employment terms and conditions before the change is effective or otherwise applied to employees. *Comau, Inc.*, 671 F.3d at 1239. The precedent that the D.C. Circuit identified, however, did not involve the unique facts that were at issue in *Comau I* regarding the extensive bargaining that occurred about employee health care between the date that Comau imposed its last best offer and the date that the new employee healthcare plan became effective. Thus, when the Acting General Counsel began litigating *Comau II*, it at a minimum had a reasonable basis to believe that the *Comau I* ALJ decision was consistent with Board precedent in light of the unique facts at issue in *Comau I* .

Counsel from bringing forward close questions of fact or new theories of law).[10]

2. The Acting General Counsel's theory that the unilateral change tainted the disaffection petition had a reasonable basis in fact

The CEA also alleges that it is entitled to attorneys fees in this case because the Acting General Counsel should have known that the facts did not support its position that Comau's March 1, 2009 unilateral change to its employee healthcare plan tainted the December 2009 disaffection petition. Specifically, the CEA asserts that the Acting General Counsel should have known that employees became dissatisfied with the ASW and chose to support the CEA before Comau unilaterally changed its employee healthcare plan.

The CEA's arguments about the facts here are identical to the arguments that the CEA made, and that I rejected, when this matter was litigated in 2010. As I explained in my decision and I now reiterate here, while I recognize that Comau employees had a variety of reasons to be unhappy with the ASW and therefore sign a decertification petition that began circulating in February 2009, the employee healthcare plan that Comau unilaterally imposed was prominent among those reasons. Furthermore, once the new healthcare plan took effect, bargaining unit discontent with the ASW reached a new high and carried forward to December 2009, when CEA representatives circulated the disaffection petition that Comau relied upon when it withdrew recognition from the ASW. See *Comau II*, 358 NLRB No. 73, slip op. at 17–18. Accordingly, there was ample evidence to support the Acting General Counsel's theory that Comau's unilateral change to its employee healthcare plan tainted the December 2009 disaffection petition.[11]

[10] In its application for attorneys fees, the CEA asserted that "[t]he mere existence of a prior administrative decision does not mean that the government's position was reasonable." See CEA Application at 5 (citing four cases in which attorneys' fees were awarded to the prevailing party after the ALJ decisions were reversed in direct appeals). While the CEA's assertion is certainly true as a general matter, as described in this order I have found that the Acting General Counsel's position in this case was substantially justified.

[11] For the same reasons, the CEA fails in its argument that the Acting General Counsel should have dismissed its case in light of the high number of employees who subjectively expressed support for the CEA. Assuming that the Acting General Counsel was aware that several employees subjectively expressed support for the CEA, the Acting General Counsel was still entitled to assert that the support for the CEA was tainted, because the Board has clearly held that the *Master Slack* decision sets forth an objective test for determining whether unfair labor practices not directly related to a decertification campaign tainted employee choice. See *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16, slip op. at 4 fn. 26 (2011). As the Board has recognized, employee testimony about their subjective reasons for supporting or rejecting a union is inherently unreliable, because with the passage of time and other factors (such as threatened reprisals for union activity that violate Section 8(a)(1)), employees are more likely to give testimony that is damaging to the union. Id., slip op. at 4. In light of the fact that the *Master Slack* test is an objective test, as well as the Board's established view that subjective employee testimony about their reasons for supporting or rejecting a union is unreliable, the Acting General Counsel was on solid ground in not changing its position in this case because certain employees expressed subjective support for the CEA.

The CEA makes much of the fact that the district court judge viewed the factual evidence differently (and in a way more favorable to the CEA) than I did when he denied the Acting General's request for injunctive relief under Section 10(j) of the Act. That attempt to get around my findings is unavailing. As a preliminary matter, the district court judge's ruling in the 10(j) proceeding is not binding on my analysis or the Board's. See *Santa Barbara News-Press*, 357 NLRB No. 51, slip op. at 4 fn.12 (2011). More important, the fact that the district court judge and I viewed the evidence differently at most demonstrates that reasonable people could differ about the merits of the Acting General Counsel's case.[12] When such reasonable disagreement is possible (as it is here), the agency's position is substantially justified. See *Pierce v. Underwood*, 487 U.S. at 563–566; *Teamsters Local 741*, 321 NLRB at 889.

C. *The Acting General Counsel's Position that the Disaffection Petition was Tainted because it was Circulated by Nonsupervisory Leaders Who Were Acting with the Apparent Authority of Comau was Substantially Justified*

It is also well established that an employer may not lawfully withdraw recognition from a union where it has engaged in unfair labor practices that directly relate to the employee decertification effort, such as actively soliciting, encouraging, promoting or providing assistance in the initiation, signing or filing of an employee petition seeking to decertify (or express disaffection for) the bargaining representative. *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16, slip op. at 2 (citing *Hearst Corp.*, 281 NLRB 764 (1986), enfd. 837 F.2d 1088 (5th Cir. 1988)). In circumstances where the employer engages in this type of misconduct, the Board "presumes that the employer's unlawful meddling tainted any resulting expression of employee disaffection, without specific proof of causation, and precludes the employer from relying on that expressed disaffection to overcome the union's continuing presumption of majority support." Id.

When this case was tried, the Acting General Counsel asserted that the disaffection petition was tainted because it was circulated by nonsupervisory lead employees acting with the apparent authority of Comau (the apparent authority theory). See *Comau II*, 358 NLRB No. 73, slip op. at 2 (noting that I found it unnecessary to rule on the Acting General Counsel's apparent authority theory due to my finding that the disaffection petition was tainted by the unilateral change to Comau's employee healthcare plan). In its request for attorneys' fees, the CEA implicitly conceded (by saying nothing about the issue) that the Acting General Counsel had a reasonable basis in law for its apparent authority theory. However, the CEA did assert, albeit with limited explanation or analysis, that the Acting General Counsel's apparent authority theory did not have a reasonable basis in fact. As I understand the CEA's argument, the CEA maintains that the Acting General Counsel's apparent authority theory was not substantially justified because: the Board ruled against the Acting General Counsel when this case was appealed; the Acting General Counsel did not argue its apparent authority theory when it appealed the district court's 10(j) ruling; and as a matter of law, the "leaders" who circulated the disaffection petition cannot simultaneously be agents of both Comau and the CEA.

[12] This point is reinforced by the fact that the Board itself was divided (2 to 1) when it initially affirmed my ruling in *Comau II* (albeit without having reviewed the CEA's appellate brief and exceptions). See *Comau, Inc.*, 357 NLRB No. 185 (2012) (withdrawn on February 8, 2012).

Each of the CEA's arguments about the merits of the Acting General Counsel's apparent authority theory falls short. Although the Board found that the Acting General Counsel did not establish that the leaders who circulated the disaffection petition did so as agents of Comau, it does not follow that the Acting General Counsel's position on that issue was not substantially justified, particularly where there was evidence that the leaders had at least a limited authority to direct the work of other employees on the shop floor. See *Comau II*, 358 NLRB No. 73, slip op. at 3–4. Similarly, although the Acting General Counsel apparently did not pursue its apparent authority theory when it appealed the district court judge's adverse ruling in the 10(j) proceeding, that fact alone does not establish that the Acting General Counsel's position was not substantially justified because the Acting General Counsel could have decided to withdraw that theory for any number of reasons other than the factual merits of the theory.[13]

As for the CEA's assertion that the leaders who circulated the petition could not simultaneously be agents of both Comau and the CEA, the CEA at most flagged an unresolved legal question that does not foreclose the Acting General Counsel's apparent authority theory. The CEA relies on Section 2(2) of the Act, which states:

> The term "employer" includes any person acting as an agent of the employer, directly or indirectly, but shall not include . . . any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

While that statutory language certainly hints at a bright-line distinction between agents of an employer and agents of a labor organization, the statutory language does not bar the Board from nonetheless evaluating whether an employee who serves as a union official also possesses apparent authority (as opposed to actual authority) to act as an agent for the employer. Given the reasonable questions about how the common-law principle of apparent authority might apply to the nonsupervisory leaders at Comau (some of whom held leadership positions with the CEA, the union that displaced the ASW), the Acting General Counsel was substantially justified in asserting the apparent authority theory in this case regarding the leaders who circulated the disaffection petition. Indeed, although the Board did not find that the leaders circulated the petition as agents of Comau, the Board did find some merit to the apparent authority theory insofar as the Board agreed that the leaders had at least some limited agency to direct the work of other employees. See *Comau II*, 358 NLRB No. 73, slip op. at 4.

D. *Viewing the Case as a Whole, the Acting General Counsel's Position was Substantially Justified*

Viewing the case as a whole, the Acting General Counsel's position was substantially justified. The Acting General Counsel presented two viable theories for why the December 2009 disaffection petition was tainted (the unilateral change to the employee healthcare plan, and the alleged involvement of Comau agents in circulating the petition), and presented credible (albeit

[13] Put another way, it would be sheer speculation for me to conclude that the Acting General Counsel decided not to pursue its apparent authority theory in the 10(j) appeal because the Acting General Counsel did not believe its position on that theory was substantially justified.

ultimately insufficient) evidence to support each theory.[14] And, contrary to the CEA's claim, the Acting General Counsel did not overreact when it asked the Board to issue an affirmative bargaining order (which would have had the effect of removing the CEA and reinstating the ASW) to remedy the alleged unlawful withdrawal of recognition from the ASW. Indeed, the Board has held that an affirmative bargaining order is the traditional and appropriate remedy when an employer violates Section 8(a)(5) of the Act by unlawfully withdrawing recognition from a union. See *Comau II*, 358 NLRB No. 73, slip op. at 22 (citing *Vincent/Metro Trucking*, 355 NLRB 289 (2010)).

Finally, the Acting General Counsel's position was substantially justified throughout all stages of litigation in this case. The Acting General Counsel reasonably pursued its theory that Comau's unilateral change to its employee healthcare plan tainted the December 2009 disaffection petition until the D.C. Circuit ruled (on March 2, 2012, in *Comau I*) that the unilateral change was lawful. Similarly, the Acting General Counsel reasonably pursued its theory that Comau agents circulated the disaffection petition until the Board ruled against it in *Comau II.*

Since the Acting General Counsel's position was substantially justified in this case at all stages of litigation, the CEA is not entitled to attorneys' fees under the EAJA. Accordingly, the Acting General Counsel's motion to dismiss the CEA's application for attorneys' fees under the EAJA is hereby **GRANTED.**[15]

Dated: Washington, D.C. September 28, 2012

Geoffrey Carter
Administrative Law Judge

[14] The Acting General Counsel prevailed on its claims that Comau and the CEA violated Section 8(a)(1) of the Act by making statements that coerced employees to sign dues-checkoff authorization forms. See *Comau II*, 358 NLRB No. 73, slip op. at 4.

[15] In light of my ruling that the CEA is not entitled to attorneys' fees under the EAJA, I need not rule on the arguments that the parties presented about the amount of attorneys fees that should be awarded.